

STATE OF NEW YORK
COUNTY OF ALBANY

COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

DECISION AND ORDER
Indictment No. 71290-23(001)
Index No. DA 321-23

DONTIE MITCHELL,

Defendant.

APPEARANCES

For the People

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For the Defendant

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Assistant Public Defender

ANDRA ACKERMAN, J.

On August 18, 2023, the defendant was charged by indictment with Murder in the Second Degree, in violation of Penal Law 125.25(1); Criminal Possession of a Weapon in the Second Degree, in violation of Penal Law 265.03(3); and two counts of Reckless Endangerment in the First Degree, in violation of Penal Law 120.25. The defendant, by written omnibus motion, moves this Court for an order granting the following relief:

1. MOTION TO INSPECT/RELEASE THE GRAND JURY MINUTES

The defendant has moved the Court to inspect the grand jury minutes, including the testimony and legal instructions. Motion granted.

The defendant has received the grand jury testimony but moves for release of the legal instructions. Release of the grand jury minutes to legal counsel is not necessary to assist the Court in making its determination on the motion (see, CPL 210.30(3)). Motion denied.

2. DISCOVERY

On September 25, 2023, the People filed a certificate of compliance and statement of readiness. This Court conducted a compliance inquiry on September 26, 2023. The defendant now moves for an order prohibiting and precluding the prosecution from introducing evidence upon trial that has not been previously disclosed to the defense – alleging that the People have failed to turn over certain discovery materials in violation of CPL 245.20. The People have responded by Affirmation in Opposition.

CPL 245.80(1)(a) offers sanctions when material or information is discoverable under CPL 245 but is disclosed belatedly, lost, or destroyed. Here, the defense has failed to show that he has been prejudiced by late disclosures - or explained how any missing/destroyed materials relate to a material issue. It also appears that some of the discovery materials, including cell phone extraction results and forensic analyses, are still being analyzed. To facilitate compliance pursuant to CPL 245.35(1), the prosecutor and counsel for the defendant are ordered to diligently confer to attempt to reach an accommodation as to any dispute concerning discovery prior to seeking a ruling from the court. So ordered.

3. MOTION TO DISMISS: LEGAL SUFFICIENCY/ DEFECTIVE GRAND JURY PROCEEDING/ IMPROPER LEGAL INSTRUCTIONS

“To hold a person responsible for the criminal conduct of another, the People must demonstrate that when acting with the mental culpability requirement for the commission thereof, he [or she] solicit[ed], request[ed] command[ed], importune[d], or intentionally aid[ed] [the principal] to engage in such conduct” (People v. Jenkins, 210 AD3d 1293, 1294 [3rd Dept. 2022][citation and quotation omitted]; see, Penal Law 20.00). Under an accomplice liability theory, the evidence must show that the defendant shared a “community of purpose” with the principal (People v. Cabey, 85 NY2d 417, 421 [1995]; People v. Fancher, 116 AD3d 1084, 1086 [3rd Dept. 2014]). A “community of purpose” is not satisfied where the evidence shows, “a spontaneous and not concerted or planned use of [a] weapon” (People v. Monaco, 14 NY2d 43, 45 [1964]; see, People v. Tapia, 33 NY3d 257, 284 [2019]; see, People v. Watkins, 200 AD3d 1078, 1080 [2nd Dept. 2021]).

The Court has inspected the grand jury minutes and finds the evidence before the grand jury insufficient to establish the offenses charged, or lesser included offenses, as to Counts 1, 4,

and 5. There was simply insufficient evidence presented before the grand jury that this defendant engaged in a common effort or acted in concert with his co-defendant to achieve the goal of committing the crimes of Murder in the Second Degree and Reckless Endangerment (see, Penal Law 20.00). The acting in concert charge is also wholly inconsistent with the People's theory of the defendant being the sole deadly force aggressor, with the codefendant "immediately withdraw[ing] from the encounter" and "running away" from the threat prior to returning fire (People's Memorandum of Law dated December 8, 2023).

The present scenario differs from People v. Russell, a case cited by the People (see, 91 NY2d 280 [1998]). While the Court of Appeals found that two defendants setting out to injure or kill one another does not preclude a finding that they intentionally aided each other to cause a third person's death, the facts in Russell differ greatly from the present case. There, three defendants engaged in a prearranged public gun battle that ultimately killed a bystander: "Despite the palpable threat, [defendant] Burroughs, armed with a nine millimeter Glock, did not flee with his friends. Rather, he continued toward [defendants] Russell and Bekka, tacitly accepting their invitation and issuing one of his own. In turn, [defendants] Russell and Bekka, also armed with automatic weapons, continued walking toward Burroughs, challenging him and accepting his challenge. As they drew nearer, defendants each began firing their high-powered guns... Indeed, even after exchanging an initial volley of shots, they continued to wage their private war, issuing taunts and ducking back and forth behind buildings and trees, seeking tactical advantage" (Russell, supra at 289 – 290).

Here, there was no evidence that the defendants "tacitly agreed to engage in the gun battle" (Russell, supra at 289) – nor is there any evidence that the defendants "intentionally aided and encouraged each other" (Russell, supra at 290). Significantly, the Court in Russell distinguished their ruling from cases where there is a spontaneous attack: "Indeed, unlike an unanticipated or spontaneous attack that might have taken defendants by surprise, the gunfight in this case only began after defendants acknowledged and accepted each other's challenge to engage in a deadly battle on a public concourse" (91 NY2d at 289). Furthermore, none of the defendants in Russell – as is the case here - "avail[ed] themselves of opportunities for safe retreat" (Russell, supra at 290).

Based on the foregoing, Counts 1, 4, and 5 should be and are hereby dismissed. The People are hereby granted leave to represent Counts 1, 4, and 5.

The defendant also moves, pursuant to CPL 190.25 (6) and 210.35 (5) for dismissal of the indictment alleging, that the integrity of the grand jury was impaired by the prosecutor's failure to charge a legal instruction for the defense of justification: deadly physical force (see, Penal Law 35.15(2)). A "prosecutor's duty of fair dealing extends not only to the submission of evidence, but also to instructions on the law, for, by statute, responsibility for instructing the Grand Jury on the law rests solely with the court and the prosecutor, and the Grand Jury may not seek legal advice from any other source" (People v. Lancaster, 69 NY2d 20, 26 [1986]). "If the prosecutor fails to instruct the grand jury on a defense that would eliminate a needless or

unfounded prosecution, the proceeding is defective, mandating dismissal of the indictment” (People v. Ball, 175 AD3d 987, 988–89 [4th Dept. 2019], quoting People v. Graham, 148 AD3d 1517, 1519 [4th Dept. 2017] and citing People v. Valles, 62 NY2d 36, 38–39 [1984]; see, People v. Mitchell, 82 NY2d 509, 514–15 [1993]; Lancaster, supra at 27).

The People have broad discretion in presenting their case to a grand jury and need not present all evidence which tends to exculpate a defendant (see, People v. Brown, 243 AD2d 750, 751 [3rd Dept. 1997]; People v. Goldston, 126 AD3d 1175, 1177 [3rd Dept. 2015]). “[A] [g]rand [j]ury need not be instructed with the same degree of precision that is required when a petit jury is instructed on the law” (People v. Calbud, Inc., 49 NY2d 389, 394 [1980]). In determining whether the grand jury must receive legal instructions on a particular defense, the case law distinguishes between defenses that are exculpatory and those that are mitigating (see, Lancaster, supra; Valles, supra). Where the evidence presented before a grand jury “supports a defense of justification, it *must* be charged” (People v. Torres, 252 AD2d 60, 64 [1st Dept. 1999][emphasis added]). “In determining whether the evidence supports a justification defense, the record must be viewed in the light most favorable to the defendant” (People v. Samuels, 12 AD3d 695, 698 [2nd Dept. 2004]). “[W]here the evidence suggests that a complete defense such as justification may be present, the prosecutor must [also] charge the grand jurors on that defense, providing enough information to enable them to determine whether the defense, in light of the evidence, should preclude the criminal prosecution” (People v. Waddell, 78 AD3d 1325, 1326 [3rd Dept. 2010], citing People v. Goetz, 68 NY2d 96 [1986]).

As relevant here, surveillance video of the incident shows an initial verbal altercation arising between the defendant and his codefendant outside a store front (see, grand jury exhibit 4). Seven of the codefendant’s acquaintances (including the victim) surrounded the defendant, with the codefendant aggressively yelling in close range to the defendant’s face – with his hand in his pocket. The codefendant can be heard yelling about his gang affiliations – as well as those on the block. As the verbal disagreement escalated, both the defendant and his codefendant pulled out firearms. The video does not depict which defendant went for their firearm first. A grand jury witness testified it was the defendant who pulled out a firearm first – though the video surveillance does not confirm this. Almost immediately after guns were drawn, the codefendant (with gun still in hand) and his acquaintances turned and ran down the street. The evidence tends to indicate that the defendant was the first person to begin shooting, however, the video surveillance does not actually depict the defendant shooting. The codefendant and an acquaintance, within several seconds, returned fire. The victim, an acquaintance of the codefendant, was shot and killed with the bullets from the codefendant’s firearm.

Witness 1 testified at the grand jury about a conversation she had with the defendant after the shooting. She testified that the defendant admitted to having a firearm at the time of the shooting but “he tried to say that he was defending himself” (grand jury minutes, page 138, lines 24 – 25) and “[the defendant] told me he was defending himself” (grand jury minutes, page 143, lines 20 – 22).

Upon consideration of the entirety of the facts presented to the grand jury, this Court finds the People's evidence established a "potential defense of justification" (Lancaster, supra) and that the prosecutor's failure to provide that legal instruction impaired the integrity of the grand jury "to such a degree that the defendant may have been prejudiced by an unwarranted prosecution" (Samuels, supra at 699; see, CPL 210.35(5)). Accordingly, defendant's motion to dismiss Counts 1, 4, and 5 should also be granted for failure to charge justification.

The Court has inspected the grand jury minutes for the remaining count against the defendant (count 2 – criminal possession of a weapon in the second degree) and finds the evidence before the grand jury was legally sufficient to establish the offense charged (see, CPL 190.65(1) and 70.10(1)). The Court finds that the proceedings substantially conformed to the requirements of Articles 190 and 200 of the Criminal Procedure Law. The Court notes that the People did give proper legal instructions to the grand jury for count 2.

4. SEVERANCE

Defendant's motion, pursuant to section 200.40 of the Criminal Procedure Law, for an order that the defendant be separately tried from his co-defendant will be decided after all pre-trial hearings have been held and determined. Decision reserved.

5. MAPP/HUNTLEY/DUNAWAY HEARINGS

6. RODRIGUEZ/WADE HEARING

The defendant moves for an order granting a Wade hearing concerning identifications made by three witnesses as described within the People's CPL 710.30 notice. The People oppose, indicating that the identifications were merely confirmatory.

Having reviewed the Notice of Identifications and grand jury minutes, this Court holds and determines that defendant's request for a Wade hearing should be and the same is hereby denied as it pertains to Witness 1 because the identifying witness knew the "defendant so well that no amount of police suggestiveness could possibly taint the identification" (People v. Rodriguez, 79 NY2d 445, 453 [1992]; see also, People v. Boyer, 6 NY3d 427 [2006]; People v. Gissendanner, 48 NY2d 543 [1979]).

As it pertains to Witnesses 2 and 3, the grand jury minutes do not provide enough information to enable this Court to determine the s familiarity with the defendant (see, People v. Coleman, 306 AD2d 549, 550 [3rd Dept. 2003]). Based upon the foregoing, a Rodriguez hearing will be held at a time to be appointed by the Court to determine if the identification was confirmatory. A Wade hearing will then be held thereafter only if warranted. This Court also notes that, based upon review of the grand jury minutes, Witnesses 2 and 3 may have a "sufficient independent basis" for their identifications - which the People bear the burden of proving by clear and convincing evidence at a Wade hearing (see, People v. Smith, 122 AD3d 1162, 1163 [3rd Dept. 2014]).

7. SANDOVAL/MOLINEUX/VENTIMIGLIA HEARINGS

Sandoval/Molineux/Ventimiglia hearings will be held shortly before trial, at a time to be determined by the Court. The People are reminded of their obligation to provide any supplemental discovery material to the defendant at least fifteen calendar days prior to the first scheduled trial date (see, CPL 245.10(1)(b) and CPL 245.20(3)).

8. FURTHER MOTIONS/RENEWAL OF MOTIONS

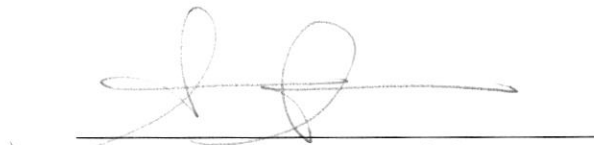
Unless otherwise indicated in this decision and order, the Defendant may make such further motions and applications that could not, with due diligence, have been raised in his original motion papers which are not inconsistent with Article 255 of the CPL.

9. OTHER MOTIONS

Any motions not specifically granted herein are hereby denied.

This memorandum shall constitute the decision of this court.

Dated: Albany, New York
December 13, 2023



ANDRA ACKERMAN, J.C.C.